Supreme Court, U.S.
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No. 98-930

**In The**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1998**

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SCOTT LOGAN GOLLAHER,

*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

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**On Petition for a Writ of Certiorari to the Utah Supreme Court**

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# BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a challenge to the Utah Court of Appeals' refusal to consider at length claims which did not present substantial federal questions?

2. Should this Court grant certiorari review to revisit the well-established ineffective assistance of counsel standard relating to pretrial investigation?

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## JURISDICTION

Petitioner, Scott Logan Gollaher, correctly recites the procedural history of this case. However, petitioner incorrectly cites as the ground of this Court's jurisdiction 28 U.S.C. § 2104 (1993), which merely addresses the manner in which review of a state court judgment shall be conducted. Because petitioner asserts state court violations of the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, this Court would presumably have jurisdiction under 28 U.S.C. § 1257 (1993) ("Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . right . . . is specially set up or claimed under the Constitution . . . ."). However, under section 1257, as discussed below, this Court lacks jurisdiction to review petitioner's first claim, to wit: that due process and the right to access to the courts, collectively guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution and the Utah Constitution, guarantee citizens of a state the right to have a court of law consider all arguments properly raised before the court.

## STATEMENT OF THE CASE

Petitioner, Scott Logan Gollaher, was convicted of sexual abuse of a child, a second degree felony.

The conviction stemmed from the jury's conclusion that petitioner fondled for several seconds the genital's of the 11-year old victim, Sarah C., as she awakened from sleep on a trampoline located in petitioner's backyard (R. 895, 923, 937, 970). Earlier in the evening, Sarah's father left her at the house of petitioner, who was a family friend, with the

intention of having Sarah babysit petitioner's then 5-year old son (R. 924-25, 943-44, 1035-36, 1238). After Sarah's father left, petitioner arranged his son and Sarah, who was wearing only her panties and one of petitioner's nightshirts, on the trampoline (R. 926-27). Thereafter, petitioner invited Sarah to his hot tub and "playfully" threw her into it (R. 928-31). When her panties became wet, Sarah, at petitioner's suggestion, gave them to petitioner to dry. They talked for about ten minutes. Then she got out of the tub, put on a dry night shirt in petitioner's house, and returned to the trampoline. Petitioner never got in the hot tub with Sarah or watched her change shirts (R. 931-35).

At the trampoline, petitioner directed Sarah to lie next to him with her feet towards his head and his feet towards her head "so that [she] wouldn't kick him or something" (R. 936). Petitioner also asked to share Sarah's blanket because he was cold. Sarah assented, and petitioner shared half of her blanket (R. 966-67). In this position, six to eight inches away from petitioner, naked beneath a blanket except for a T-shirt, Sarah fell asleep (R. 935-37, 964). She was awakened by petitioner's finger touching her "private" (R. 937). In response, she moved around and changed positions, but petitioner kept putting her back in the same position (R. 937-38). She did not recall how many times petitioner's finger was in her private, but it was between about six and nine seconds (R. 939, 969-70, 997-98). Scared, she got off the trampoline to retrieve her wet panties, returned to the trampoline, and got back into the same position as before. Concerned about walking home in the dark, Sarah stayed the night (R. 939-941). In the morning she awoke to find only petitioner's son, who slept through the incident, on the trampoline (R. 942).

Sarah testified she was scared because "[she] didn't think [petitioner] would do that 'cause he was such a close friend" (R. 943-44). She did not tell anyone because she was scared of what might happen (R. 944). Though Sarah acknowledged that she had testified at the preliminary hearing that she thought the incident might have been a dream, she was sure that petitioner had, in fact, touched her "private" (R. 943).

Late in 1993, on or about New Year's Eve, Sarah and her sister and father were in petitioner's hot tub with petitioner and petitioner's son, at which time Sarah thought she felt petitioner again touch her "private" for a few seconds (R. 907, 914-15, 1079, 1267).

Sarah did not tell anyone about the hot tub episode (R. 916). However, later that month, she and her father watched a television program about another young girl who had also been sexually abused (R. 918, 1038-1041). She said nothing to her father, but after the program, Sarah immediately went to her mother and disclosed the particulars of petitioner's abuse (R. 868-69, 918-21, 1020, 1042).

Petitioner admitted that he could have touched Sarah while he slept, but stated that he did not inappropriately touch her (R. 1255, 1292). Other witnesses for the defense testified that they frequently saw Sarah at petitioner's home, though frequently in the close company of her father (R. 1186-88, 1197, 1199, 1203, 1218, 1221).

**Facts Relating to Claims the Court of Appeals Cursorily Addressed.**

At trial, Sarah was unable to give the prosecutor a definitive answer when he first asked her how long or how many times petitioner's finger was in her "private" while they were on the trampoline, stating that petitioner rubbed her "up and down" for a "couple of seconds" (R. 914, 939, 961-62). However, he was able to elicit a response relating to the hot tub incident in late December 1993, which enabled Sarah to expressly assert how long petitioner had touched her in the trampoline incident, to wit: six seconds and that petitioner touched her longer with his hand on the trampoline than he did with his foot in the hot tub (R. 969-70). On cross-examination petitioner's trial counsel, Mr. Ronald Yengich, timed Sarah's recollection of how long petitioner touched her in the hot tub at 9.7 seconds (R. 998).

In closing, the prosecutor without specific reference to the hot tub, argued to the jury that by putting the evidence together it could find that petitioner had touched Sarah on the trampoline from six to nine seconds (R. 1316, 1323). Explaining the distinction between direct and circumstantial evidence, the record records the prosecutor as stating: "Except that he remembered it was rubbing. It was rubbing for a considerable period of time. That's pretty firm circumstantial evidence that the person who was doing it was awake" (R. 1317) (emphasis added).

Mr. Yengich, did not object to these closing remarks. The court of appeals declined to address petitioner's allegation that the prosecutor's remarks constituted misconduct because petitioner "does not present us with an

adequate plain error argument." State v. Gollaher, No. 960618-CA, slip op. at 3 (Utah App. Feb. 26, 1998) (unpublished) ("Gollaher").

**Facts Relating to Alleged Failure to Investigate.**

Sarah C. testified at the preliminary hearing that she knew that petitioner's touching her on the trampoline was not a dream when she experienced a similar episode in the hot tub on New Year's Day (R. 795). Sarah did not disclose the abuse until she had seen a television program portraying another young girl who had been abused (R. 918). Sarah's father said that the program that led to his daughter's disclosure was on around January 12 or 13, 1994, but that he did not know the channel it was on (R. 1139).

Following trial, Mr. Yengich (R. 263) or petitioner (R. 645) asserted that the program viewed by Sarah and her father was a "20/20" program, aired on January 28, 1994 (R. 263, 299-302). Upon this "newly discovered" evidence, Mr. Yengich moved for a new trial (R. 253-306). In support of his motion, Mr. Yengich claimed that he could not have presented the transcript of this program because the name of the program was unknown and unable to be discovered, to wit: the program was never mentioned in any of the proceedings and the victim could not remember when the program was aired (R. 266). Before that motion could be heard, petitioner engaged different counsel, Brent Ward, and asserted in a substituted motion for arrest of judgment or for a new trial that he had suggested by written memorandum sent prior to trial that Mr. Yengich identify the program Sarah and her father watched for the purpose of assessing her motivation, and that Mr. Yengich had done nothing (R. 643).

The substituted motion claimed that Sarah's rendition of sexual abuse was so remarkably similar to a sexual abuse victim's story portrayed in the "20/20" segment entitled, "Making Him Pay," that it indicated, along with other alleged infirmities in Sarah's accounts, that her rendition was likely the product of suggestion rather than real experience (R. 508-10, 525, 591-601).[1] Mr. Yengich's new trial motion also charted the similarities subsequently referred to in the substituted motion (R. 263-65), all of which petitioner repeated in his opening brief on appeal and in his petition for writ of certiorari in the Utah Supreme Court. App. Br. at 17; Pet. Br. at 9-10.

In further support of his substituted motion, petitioner offered the testimony of Phillip Esplin, Ph.D., a psychologist with expertise in child sex abuse and post-event memory recall (R. 1574-76). Dr. Esplin, who read the police reports, preliminary and trial testimony, Sarah's statement to the police and a transcript of the "20/20" program, but neither attended trial nor reviewed the videotaped police interview (R. 1578), said that his expertise could have been "helpful" in educating the jury on some aspects of the case.

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[1] Based on the transcript of the "20/20" program (R. 236-39), Desiray Bartak was ten years old when she was sexually abused by her godfather, one of her father's closest friends (R. 236-37). While visiting with her godfather on a summer vacation, she awoke to his "massaging and molesting" with his fingers inside her, an experience she thought must be a dream (R. 236-38). Afterward, Desiray did not talk about the incident because she was afraid that her godfather might hurt someone in her family (R. 237). Only after he attempted to abuse her the following summer did she tell her story (R. 237). As a result of her disclosure, Desiray was lauded for her courage in coming forward with her story and publicly leading an effort in similarly encouraging other victims (R. 238).

On cross-examination, Dr. Esplin acknowledged that all sexual molestations have elements in common and frequently involve the perpetrator's putting his hands on the victim's vaginal area, and that perpetration by a close family friend while the victim is asleep or pretends to be asleep is a common feature that he did not find unusual (R. 1611-13). He also admitted that in the eleven pages of comparison prepared by petitioner, only four statements of the T.V. victim paralleled Sarah's statements (R. 1610).

Testifying for the State, Sally Anderson, Sarah's counselor, asserted that sex abuse victims frequently postulated that their experiences might have been dreamed, as a defense mechanism against the fact of the abuse (R. 1645-47, 1751). Ms. Anderson further stated that even if she had known that the television program contained such similar factors, that would not have caused her to doubt the certainty of Sarah's memory of her experience because the "20/20" program merely allowed Sarah to talk about her experience and not get in trouble (R. 1785-86). Mr. Bruce Giffen, M.Sci., a forensic examiner in child abuse cases retained by petitioner post-trial to assess the effect of the television program, opined that the "20/20" program was not the genesis of Sarah's disclosure of sexual allegations (R. 677, 683-84).

Additionally, there were significant differences in Sarah's and Desiray's accounts. Particularly, (1) Sarah reported that petitioner rubbed her genitals between six and nine seconds, whereas Desiray's godfather molested her for ten minutes (R. 238, 969, 998); (2) Sarah did not report the abuse because petitioner was such a close friend, whereas Desiray feared her godfather, whom she "hates" and "will

never forgive," might retaliate (R. 237-38, 944, 1646, 1770); and (3) Sarah readily told her mother upon seeing the "20/20" program, whereas Desiray doubted that he mother would believe her because her godfather was a trusted friend (R. 237, 868-69, 918-21, 1020, 1042).

Additionally, in response to petitioner's substituted motion, Mr. Yengich filed an affidavit asserting as to the "20/20" program, that "neither myself, Mr. Gollaher, nor Mr. Cope [prosecutor] was aware of that program," acknowledging that it "could have been of some assistance, [but] no one knew about it at the time" (R. 678).

The trial court denied the substituted motion, finding that the jury had petitioner's evidence arguing the victim's "dream," and "the information about the T.V. program, and could consider all those things, and did, I suppose" (R. 1815-16).

The Utah Court of Appeals found Mr. Yengich was not ineffective in not allocating pretrial resources to a search for the "20/20" transcript and that, "after comparing the program transcript found post-trial [with the victim's testimony] . . . our confidence in the verdict is not undermined." Gollaher, slip op. at 3 (citation omitted).

## REASONS FOR DENYING THE PETITION

### I. This Court Lacks Jurisdiction Concerning Petitioner's First Question.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (noting that a federal question that had not been raised, preserved, or passed upon in the state courts deprived not only the Court of jurisdiction under 28 U.S.C. § 1257, but also the state court of an opportunity to consider the matter). See also Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 276-277, 277 n.23 (1989) (declining to find either that a nonconstitutional argument "clearly intended" a constitutional one, or that a claim made under the Eighth Amendment embraced one asserted under the Due Process Clause of the Fourteenth Amendment).

Petitioner accurately notes that he claimed the Utah Court of Appeals' improperly refused to consider issues relating to remarks made by the prosecutor. However, contrary to petitioner's assertion, see Br. of Pet. at 5, he never argued, either to the court of appeals in his petition for rehearing or to the Utah Supreme Court in his petition for writ of certiorari, any federal constitutional basis for his claim. Rather, petitioner argued in the court of appeals only that the court incorrectly applied rule 24(a), Utah Rules of Appellate Procedure (requiring briefs contain arguments related to issues presented), and State v. Blubaugh, 904 P.2d 688, 707 (Utah App. 1995) (refusing to consider inadequately preserved claims of prosecutorial misconduct under the plain

error standard), cert. denied, 913 P.2d 749 (Utah 1996). See Pet. for Rehearing at 2-5. In the Utah Supreme Court, petitioner made precisely the same argument as in the court of appeals, with the additional assertion that certiorari was warranted under rule 46, Utah Rules of Appellate Procedure (identifying considerations governing review of certiorari) because "[f]ailure of the Court of Appeals to address all of the issues raised on appeal constitutes a major departure "from the accepted and usual course of judicial proceedings." See Pet. for Certiorari at 14-16.[2]

In sum, petitioner failed to preserve any substantial federal question in Utah's appellate courts, and therefore, this Court lacks jurisdiction to consider petitioner's first question. Furthermore, the Utah Court of Appeals did cursorily consider petitioner's claims, see Gollaher, slip op. at 3, and

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[2] Only in his reply to the State's brief in opposition to certiorari did petitioner raise, by citation without any substantive argument, a federal due process claim under the Fifth Amendment, and he never claimed any right to access to the courts under the First Amendment. See Reply to Br. in Opp. at 4. However, under Utah law, Utah's appellate court's will not consider, for lack of preservation, a claim first raised in a reply brief. See Trail Mountain Coal Co. v. Utah Div. of State Lands and Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996) (refusing to consider petitioner's claims concerning statute of limitations first raised in reply brief because petitioner failed to present to the Court a "full and proper presentation of the issues"), cert. denied, 117 S. Ct. 1017 (1997); McDougal v. Weed, 945 P.2d 175, 179 n.3 (Utah App. 1997) ("'Because presentation of this argument in a reply brief does not conform to "Rule 24(c) of the Appellate Rules of Procedure limiting answers in a reply brief to new matter in the appellee's brief," we decline to consider this argument.'")(citation omitted); State v. Phathammavong, 860 P.2d 1001, 1002 n.2 (Utah App. 1993) (striking the defendant's reply brief after oral argument because, in part, it raised new issues).

understood them patently without merit,[3] thus rendering petitioner's first question groundless. Finally, authority cited by petitioner is totally distinguishable from this case, and therefore lends no support for his claim. See Matthews v. Eldridge, 424 U.S. 319, 345-49 (1976) (no denial of due process where social security disability claimant may be denied benefits before an evidentiary hearing but only after being allowed opportunity to present sufficient evidence of medical condition); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 892-93 (1986) (reversing district court's refusal to hear Indian tribe's negligence claim for lack of subject matter jurisdiction which totally denied tribe's ability to have its claim heard).

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[3] The facts plainly show that, in accord with the evidence, that the prosecutor determined the period of abuse on the trampoline by referring to the approximate six to nine second period of abuse Sarah believed petitioner touched in the hot tub, (R. 969-70). Secondly, the prosecutor's statement, in apparent reference to petitioner, i.e. "***he*** remembered it was rubbing," is obviously a recording error in the transcript because ***"he,"*** as opposed to ***"she,"*** makes no sense where (1) the prosecutor was in the midst of explaining that there was only circumstantial, as opposed to direct, evidence that petitioner's touching was not inadvertent, (2) it was undisputed that petitioner never acknowledged rubbing Sarah's genitals intentionally, a fact that could not have been missed by the jury during a hotly contested, two-day trial, and (3) a prominent defense attorney failed to object to what would be a plainly inaccurate remark.

## II. Because This Court Has Established Clear Standards Concerning Ineffective Assistance of Counsel for Failure To Investigate, Certiorari Review is Unwarranted.

Petitioner asserts that this Court should grant certiorari review because his trial counsel, Mr. Yengich, failed to investigate a television program that purportedly would have lent support to the defense's theory of the case. However, as petitioner notes, see Br. of Pet. at 8, this Court has already set standards of review for ineffective assistance of counsel in precisely the situation presented in this case. See Strickland v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."). Indeed, in Strickland, this Court granted certiorari because the Court had neither directly and fully addressed a claim of actual ineffectiveness in a case going to trial, nor established standards for assessing ineffective assistance of counsel. Id. at 683-84. Thus, petitioner's request for certiorari review asks this Court to walk well-trodden ground, merely for the purpose of correcting an allegedly incorrect result based on well-established principles, an inadequate basis for granting certiorari. Cf. Ross v. Moffit, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Moreover, petitioner's request invites this Court to become involved in hairsplitting assessments of adequate investigation, an inappropriate standard in the evaluation of effective assistance of counsel. Strickland, 466 U.S. at 689 ("Indeed, the existence of detailed guidelines for representation could distract counsel from the

overriding mission of vigorous advocacy of defendant's cause.").

In any case, the Utah Court of Appeals correctly concluded under this Court's guiding principles in Strickland, and its Utah progeny, that Mr. Yengich did not render ineffective assistance of counsel. The court of appeals noted: "We agree with the trial court that the record shows, 'as a whole,' counsel actively investigated potential defense tactics and the underlying facts of the case," and that this was not a case in which counsel merely stood by as trial approached. Gollaher, slip op. at 2-3. Implicit in the lower court's recognition of counsel's "active investigation" are the court of appeals' findings that Mr. Yengich did not have time for a fishing expedition for a program which, as the record supports, was unknown by either name or date to any of the parties and not mentioned in any of the proceedings (R. 266, 678).

More importantly, the court of appeals considered the "20/20" transcript and concluded that petitioner was not prejudiced by Mr. Yengich's failure to discover it pretrial. Gollaher, slip op. at 3. Petitioner's stated purpose for the transcript was to show that Sarah's rendition of events was so similar to a story told by the child sex abuse victim portrayed on "20/20" as to be suggested, and therefore apocryphal. (R. 508-10, 525, 591-601). Petitioner offered Dr. Esplin's testimony as primary support for this theory (R. 1574-76, 1588-90). However, had this testimony been offered at trial, it would have been dramatically rebutted by Sally Anderson, Sarah's counselor, and Bruce Giffen, petitioner's post-trial forensic examiner (R. 677, 683-84, 1645-47, 1751, 1785-86). Indeed, the trial court recognized that Mr. Yengich had made

the correct tactical decision in not calling an expert to testify to the victim's suggestibility, based on the State's rebuttal at the hearing on petitioner's substituted motion: "The jury would have been out a substantially less period of time had they heard that evidence" (R. 1822). Additionally, in comparing the testimonies of the Sarah and Desiray Bartak, the court of appeals evidently agreed with the State that the similarities were not sufficient to undermine its confidence in the verdict, a finding which petitioner does not dispute.[4]

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[4] In his petition for writ of certiorari in the Utah Supreme Court, petitioner urged the court to grant certiorari based on Mr. Yengich's failure to search for the then-unknown television program, citing State v. Templin, 805 P.2d 182 (Utah 1990), in support. See Br. of Pet. at Appendix B, p. 16a. Templin however, is substantially different from this case, see id. at 186-88 (finding ineffective assistance where counsel knew of, but chose not to investigate witness who actually observed the victim's amorous behavior less than an hour before the alleged rape).

## CONCLUSION

The Court should deny the petition.

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